STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 31, 2001
v	No. 221287 Wayne Circuit Court
TONY D. WASHINGTON, Defendant-Appellant.	LC No. 98-013206

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was charged with two counts of criminal sexual conduct in the first degree, MCL 750.520b(1)(a). Following a bench trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and sentenced to ten to fifteen years in prison. Defendant appeals as of right. We affirm.

First, defendant contends that the district court erred when it bound defendant over for trial. We disagree. A district court's determination that sufficient probable cause exists will not be disturbed unless the determination is wholly unjustified by the record. *People v Northey,* 231 Mich App 568, 574; 591 NW2d 227 (1998). A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that (1) a felony was committed and (2) the defendant committed that felony. *Id*. Probable cause requires a reasonable belief that the evidence presented during the preliminary examination is consistent with the defendant's guilt. *Id.* at 575. Circumstantial evidence, coupled with those inferences arising from it, is sufficient to establish probable cause to believe that the defendant committed a felony. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997).

Defendant was charged with two counts of first-degree criminal sexual conduct pursuant to MCL 750.520b(1)(a), which provides that

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

The definition of sexual penetration includes "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(1); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). First-degree criminal sexual conduct is a general intent crime. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000). No intent is required other than that evidenced by doing the acts constituting the offense. *Id.* At the preliminary hearing, the victim, who was six at the time of the incident, testified that defendant "put his dick in her butt" and that he did it everyday. We agree with the district court that the victim's testimony was sufficient evidence to establish probable cause to believe that defendant committed at least two counts of first-degree criminal sexual conduct by sexually penetrating an individual under the age of thirteen.

Defendant also argues that, because the district court stated that it found some credibility problems with the prosecution's case, the court should have dismissed the case. Specifically, defendant alleges that the court used an incorrect standard to bind defendant over because it was not sure that defendant had committed the crime. Although the district court should consider the weight of the evidence and the credibility of the witnesses in determining whether to bind defendant over for trial, it may not usurp the role of the jury. *Northey, supra* at 575. The testimony provided by the victim and her mother provided competent evidence supporting an inference that defendant committed the crimes charged. Although it expressed concern over credibility issues with the case, the court did not waiver in holding that the testimony provided probable cause to bind defendant over for trial, and the court was correct to leave the factual questions raised by that testimony to the finder of fact. *Id.* Accordingly, we find no error in the trial court's decision to deny defendant's motion to quash the information.

Defendant also argues that the prosecution failed to present sufficient evidence to support defendant's conviction for second-degree criminal sexual conduct. When reviewing a sufficiency of the evidence claim, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant was originally charged with two counts of first-degree criminal sexual conduct and the trial court found defendant guilty of one count of second-degree criminal sexual conduct. To prove that defendant committed second-degree criminal sexual conduct, the prosecution was required to show that defendant engaged in sexual contact with a person under the age of thirteen. MCL 750.520c(1)(a); *In re Ayres*, 239 Mich App 8, 24; 608 NW2d 132 (1999). Sexual contact is defined as the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. *Id.* Criminal sexual conduct is a general intent crime and the defendant's specific intent is not an issue. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997).

In the instant case, the victim testified that defendant came into her room, pulled down her panties, and "put his penis in her butt." Also, the victim testified that defendant told her to "shh," and he put his hand over her mouth to prevent her from calling her mother. At the time of

the assault, the victim was six years old. Additionally, the victim told the doctor that defendant put his penis between her legs in front and rubbed it on her butt. Viewing these facts in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant engaged in sexual contact with a victim who was under the age of thirteen.

Defendant also argues that the evidence was insufficient because of inconsistencies in the witnesses' testimony. This Court gives great deference to the superior ability of the trial court to assess the credibility of a witness. MCR 2.613; *People v Eggleston,* 149 Mich App 665, 671; 386 NW2d 637 (1986); *People v Howard,* 226 Mich App 528, 543; 575 NW2d 16 (1998). Questions regarding the credibility of witnesses are a matter for the trial court, as the trier of fact, to decide. *People v Fetterley,* 229 Mich App 511, 545; 583 NW2d 199 (1998). Consequently, we find there was sufficient evidence to support defendant's conviction for second-degree criminal sexual conduct.

Defendant also contends that the prosecutor made improper statements in his closing argument, and therefore, deprived defendant of a fair trial. A prosecutor may not make a statement of fact that is unsupported by the evidence. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Id.* Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief. *People v Bahoda,* 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, the prosecutor is not required to state the arguments in the blandest possible terms. *Schutte, supra* at 722.

In the present case, defendant contends that the following statement by the prosecutor constituted reversible error:

> [Sex offenders typically] place their penises or whatever object they have in the vaginal opening or in the anal opening and masturbate, pushing against the anal opening just enough to give him the sexual pleasure, but not enough to cause her any injuries and that's how [the victim] testified in this case.

However, these remarks must be considered in context and evaluated in light of defense arguments and their relationship to the evidence presented at trial. *People v Phillips,* 217 Mich App 489, 497; 552 NW2d 487 (1996). Here, the prosecutor was merely responding to statements made by defense counsel concerning the lack of physical evidence of penetration. The prosecutor's remarks were not inappropriate because the comments were no more than a response to defense counsel's argument. *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, the trial court was aware that it had to decide the case on the evidence alone and that the lawyers' statements were not evidence. *People v Green,* 228 Mich App 684, 693; 580 NW2d 444 (1998). After a contextual review of the prosecutor's remarks, we conclude that the comments did not deprive defendant of a fair trial. *Schutte, supra* at 722.

Finally, defendant contends that his sentence was not proportionate. The principle of proportionality requires that a sentence be proportionate to the seriousness of the circumstances

surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). A sentence that violates the principle of proportionality constitutes an abuse of discretion. *Oliver, supra*. Permissible factors that may be considered by the court when imposing sentence include the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses. *Id*.

In the instant case, defendant's sentence was within the applicable sentencing guidelines range, and, therefore, it is presumptively neither excessively severe nor unfairly disparate. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). Further, defendant failed to overcome the presumption of proportionality, and we are satisfied that defendant's ten-year minimum sentence reflected the seriousness of the matter. *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder